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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No. 70-154

JOHNNIE PRUETT,

Petitioner

v.

THE STATE OF TEXAS, and
J. F. CLAWSON, JR.,

Respondents

PETITIONER'S SUPPLEMENTAL BRIEF

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PETITIONER'S SUPPLEMENTAL BRIEF

TO THE HONORABLE SUPREME COURT
OF THE UNITED STATES:

The Petitioner, Johnnie Pruett, begs leave to file this supplemental Brief. Rule 24, par. 5.

PETITIONER SUCCESSFUL ON HABEAS CORPUS

Unable to obtain stays, and failing to obtain an in-

junction, preventing enforcement of the Order of the Court of Criminal Appeals, Petitioner was reincarcerated after the filing of his Petition for Certiorari herein.

After extensive hearings before the Honorable Judge D. W. Suttle in the United States District Court for the Western District of Texas, Petitioner was granted release from custody, on his Petition for Writ of Habeas Corpus, by said District Court. *The case is not moot, because the State is appealing the District Court's judgment.*

In order to advise the Supreme Court of recent developments in this case, and because the Opinion of Judge Suttle in the habeas matter, rendered August 24, 1971, so clearly and with such masterly skill states the law on the issues involved, we respectfully copy same now verbatim, and urge the principles and authorities therein expressed and cited as our Supplemental Brief.

This Opinion, written with a facile pen and remarkable for its insight and concise treatment, follows:

OPINION OF JUDGE SUTTLE

"UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

"JOHNNIE PRUETT		
v.	}	A-71-CA-50
STATE OF TEXAS, ET AL		

"ORDER GRANTING PETITION FOR WRIT OF HABEAS CORPUS

"After affirmance of his conviction for sodomy, *Pruett v. State*, 463 S.W.2d 191 (Tex.Cr.App. 1970), *app. dismissed*, 402 U.S. 902 (1971), petitioner applied to the convicting Court for and received credit on his 2 year sentence for time spent in jail pending appeal and good-time credit of 1/3 time served, and was ordered released. Upon application of the State for extraordinary relief, the Texas Court of Criminal Appeals held that the convicting Court was not empowered by State law to grant good-time credit, and ordered petitioner reincarcerated. *State v. Clawson*, 465 S.W. 2d 964 (Tex.Cr.App. 1971). Petitioner filed the instant petition, contending that such credit is required by the 14th Amendment to the United States Constitution.

"In presenting his claim to the convicting Court and the highest appellate Court in the State, petitioner has exhausted his State remedies. *Brown v. Allen*, 344 U.S. 443, 448 (1953). The constitutional questions here raised regarding the State statutory scheme as interpreted by those Courts is properly before this Court, and the Motion to Dismiss is, in all things, DENIED, and IT IS SO ORDERED.

"Since petitioner appealed his felony conviction and could not post bond, he was committed to jail pursuant to Tex. Code Cr. Pr.* art. 44.04(e), and thus, apparently, was not entitled to consideration under the statute providing good-time credit for penitentiary prisoners. Tex. Rev. Civ. Stat. Ann. art. 6184 *1* (1970). However, since he was in jail under a penitentiary sentence, he was not entitled to consideration under the State statute providing good-time credit for county jail prisoners. Tex. Rev. Civ. Stat. Ann. art. 5118a (1971); *State v. Clawson*, *supra*; Tex. Att'y Gen. Op. No. C-310 (1964). Thus, because he appealed his conviction, petitioner, under the relevant State statutes as construed by its Courts, was excluded from consideration for good-time credit otherwise afforded both misdemeanor and felony prisoners who do not appeal. Such a result is constitutionally impermissible.

"The Court of Criminal Appeals correctly held that petitioner was entitled to credit toward his final sentence for time spent in custody pending appeal. See *Robinson v. Beto*, 426 F.2d 797 (5th Cir. 1970). But to fully insure that the State's appellate avenues are

*By clerical error cited in Opinion as Penal Code Ann.

free from unreasonable distinctions that impede open and equal access to the Courts, this credit must be complete and full. *North Carolina v. Pearce*, 395 U.S. 711, 719 n.13 (1969); *Allen v. Henderson*, 434 F.2d 26, 27 (5th Cir. 1970). While the State need not provide good-time credit at all, *Singleton v. Shafer*, 313 F.Supp. 1094 (E.D.Pa. 1970), and if provided may administer it with discretion, See *Quick v. Beto*, 373 F.2d 739 (5th Cir. 1967); *Grossnickle v. Alabama*, 415 F.2d 864 (5th Cir. 1969), it may not create *de facto* classification unjustified in terms of governmental purpose, *Baldwin v. Smith*, 316 F.Supp. 670 (D.C. Vt. 1970), or which impedes avenues of appellate review. *North Carolina v. Pearce, supra* at 724; *Robinson v. Beto, supra.* The result of the instant statutory scheme, which denies petitioner consideration for good-time credit available to other prisoners because he appealed his conviction, creates both an unjustified classification and unreasonable impediment to appellate review of criminal convictions, and hence violates petitioner's rights under the 14th Amendment to the United States Constitution.

"Petitioner must therefore be considered for good-time credit as would other State prisoners. Since both of the pertinent statutes provide for 1/3 credit for time served, a choice between them for computation need not be made. Supra art. 5118a, 6184 *1*. Furthermore, since the conduct record required under both statutes has not been kept and there is no evidence of any "sustained charge of misconduct," *ibid.*, petitioner must be credited with the time found due him by the convicting Court. See *Gilliam v. State*, 174 Tenn. 388, 126 S.W.2d 305, 307 (1939).

"The Petition for Writ of Habeas Corpus is therefore, in all things, GRANTED, and Respondents shall release petitioner from further custody in relation to the instant sentence, and IT IS SO ORDERED.

"Entered this 24th day of August, 1971.

D. W. SUTTLE
United States District Judge"

PRAYER

Petitioner prays that the Writ be granted, or that the Court summarily enter judgment discharging Petitioner, and for general relief.

Respectfully submitted

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